IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8624 OF 2006

Sanjay Baliram Dhamal .. Petitioner

V/s

The State of Maharashtra & Ors. .. Respondents

WITH

WRIT PETITIONS NO. 6520/06, 6780/06, 6808/06, 7218/06, 7281/06, 7285/06, 7286/06, 7318/06, 7325/06, 7873/06, 7874/06, 7895/06, 7912/06, 7918/06, 7982/06, 7983/06, 8050/06, 8624/06, 114/07, 226/07, 233/07, 234/07, 359/07, 472/07, 473/07, 474/07, 496/07, 621/07, 1096/07, 1098/07, 1100/07, 1819/07, 1851/07, 1853/07, 2110/07, 2130/07, 2138/07, 2140/07, 2160/07, 2216/07, 2501/07, 2551/07, 2605/07, 2608/07, 2610/07, 2746/07, 2847/07, 2882/07, 2883/07, 2888/07, 2901/07, 2947/07, 2968/07, 2971/07, 2973/07, 3367/07, 4292/07, 4508/07, 4889/07, 5072/07, 5082/07, 5423/07, 5612/07, 5617/07, 5647/07, 5653/07, 5655/07, 5746/07, 6266/07, 8037/06, 8625/06, 8639,06, 8640/06, 8641/06, 8642/06, 8643/06, 8645/06, 8646/06, 8648/06, 8651/06, 8652/06, 8653/06, 8675/06, 8676/06, 8677/06, 8678/06, 8679/06, 8680/06, 8684/06 to 8687/06.

Mr.G.S. Godbole with Mr.S.M. Sahastrabudhe, Mr.S.S. Kanetkar, Mr.Nitin Mulye and Mr.Satyajeet Mirajkar for the petitioners in Writ Petition Nos.8624/06, 226/07, 233/07, 234/07, 359/07, 472/07, 473/07, 474/07, 496/07, 2501/07, 2551/07, 2605/07, 2608/07, 2610/07, 2883/07, 2888/07, 2901/07, 2947/07, 2968/07, 2971/07, 2973/07, 4508/07, 5647/07, 8037/06, 8625/06, 8639,06, 8640/06, 8641/06, 8642/06, 8643/06, 8645/06, 8646/06m 8648/06, 8651/06, 8652/06, 8653/06m 8675/06, 8676/06, 8677/06, 8678/06, 8679/06, 8680/06, 8684/06 to 8687/06.

Mr.G.K. Masand, Senior Advocate with Mr.S.R. Atre i/b Ms.Leena Patil for the petitioners in Writ Petition Nos.114/07, 1096/07, 1098/07, 6520/06.

Mr.V.M. Tayade for the petitioners in Writ Petition No.621/07, 3367/07.

Mr.J.G. Reddy and Mr.S.B. Talekar for the petitioners in Writ Petition No.1100/07, 6780/06 to 6808/06.

Mr.V.A. Gangal, Senior Advocate with Mr.Ashok Gade for the petitioners in W.P. Nos.1819/07, 1851/07, 1853/07, 2110/07, 2130/07, 2138/07, 2140/07, 2160/07, 5072/07, 5612/07, 5617/07.

Mr.Rahul Kate for the petitioners in W.P. Nos.2216/07, 2882/07, 4889/07, 5423/07, 5653/07 and 5655/07.

Mr.K.K. Malphatak with Mr.Manoj Bhatt for the petitioners in Writ Petition Nos.2746/07, 2847/07, 4292/07, 5082/07, 5746/07 and 6266/06.

Mr.N.V. Bandiwadekar for the petitioners in W.P. Nos.7218/06, 7281/06, 7285/06, 7286/06, 7318/06, 7325/06, 7873/06, 7874/06, 7895/06, 7912/06 to 7918/06, 7982/06, 7983/06 and 8050/06.

Mr.A.A. Kumbhakoni, Associate Advocate General with Mr.S.R. Nargolkar, A.G.P. for the respondent no.1 State.

Mr.P.M. Pradhan for respondent no.2.

CORAM : S.B. MHASE &
D.G. KARNIK, JJ.

DATE OF RESERVING THE JUDGMENT : 21ST AUGUST 2007

DATE OF PRONOUNCING THE JUDGMENT: 26TH OCTOBER 2007

JUDGMENT : (Per D.G. Karnik, J.)

1. Rule, returnable forthwith. By consent, called for hearing.

2. By these writ petitions, the petitioners

challenge the common judgment and order dated 5th May 2006 passed by the Maharashtra Administrative Tribunal (for short "the MAT") in Original Application No.1061 of 2004 along with other applications. Before the MAT, the petitioners had sought a declaration that the computation of vacancies by the respondent no.1 of 300 posts for Police Sub-Inspectors (for short "the PSI") to be filled by Limited Departmental Examination - 1992 was illegal and wrong and further declaration that there existed additional vacancies to the extent of 1571 posts. They further sought a direction to the respondent no.1 fill up the said vacancies to the extent of 1571 posts of PSI by appointing the petitioners and others who were not recommended for appointment to the posts of PSI by limited departmental examination by the respondent no.2 - the Maharashtra Public Service Commission (for short "the M.P.S.C."). Before us, an oral prayer was made that a mandamus or a direction in the nature of mandamus be issued to the respondent no.1 State to appoint the petitioners as PSI and send them for training to the Police Academy, Nasik prior to their appointment as PSI.

3. The petitioners are serving as Police Havaldars, Constables, Police Head Constables, etc. (hereinafter referred to as "police constables") who are eligible for

promotion to the posts of PSI. As per the Police Sub-Inspector (Recruitment) Rules, 1995 (for short "the Recruitment Rules") appointments in the posts of Sub-Inspectors of Police (PSI) are to be made from three sources, namely (i) by promotion of suitable persons on the basis of seniority subject to fitness from amongst the persons holding the posts of Havaldars and Assistant Police Sub-Inspectors in the Police Force who have completed not less than 5 years of continuous regular service (for short "by regular promotion"), or (ii) by selection of persons working in the Police Force on the basis of Limited Departmental Examination to be held by the MPSC (for short "limited departmental examination"), or (iii) by nomination on the basis of result of a competitive examination to be held by the MPSC. in accordance with the Rules made in that behalf from time to time (for short "direct recruits"). The appointments to the posts of PSI from the aforesaid three sources, viz. by promotion, limited departmental examination, and direct recruits are to be made in the ratio of 25:25:50.

4. It appears that in the year 2002, the respondent no.1 took a decision to fill up vacancies and to appoint 300 PSI by limited departmental examination from amongst the eligible persons working in the Police Force.

Accordingly, a notification was issued on 24th February 2003 by the respondent no.1 requesting MPSC to hold an examination and recommend the names of 300 candidates. The notification stated the written examination would be of 300 marks and the 1200 candidates according to the order of merit in the written examination (forming zone of consideration) would be called for physical examination which would be of 100 marks and oral and personality tests of 50 marks. The first 300 candidates according to order of merit prepared on the basis of aggregate marks would be recommended by the MPSC for appointment. Accordingly, the limited departmental examination was held by the MPSC in the year 2003. The petitioners and other candidates, who had secured a place in the first 1200 candidates according to the number of marks in the written examination, were called for physical examination and the oral and personality test. The names of the candidates were then arranged in the order of merit on the basis of the aggregate number of marks secured by each candidate and the MPSC recommended the names of the first 300 candidates for appointment as PSI. The 300 candidates, whose names were so recommended by the MPSC were thereafter sent for mandatory training to the Police Academy, Nasik and have been appointed as PSI. The petitioners are police constables who had appeared for the limited departmental

examination held by the MPSC and were within the first 1200 candidates in the order of merit in the written examination but who were outside the first 300 candidates in the order of merit on the basis of aggregate marks in written, physical and oral examinations. Consequently, the petitioners were not recommended for appointment as PSI by the MPSC though they had been called for physical test and oral interview after the written examination. Aggrieved by non-recommendation of their names by the MPSC for appointment as PSI, each of the petitioners approached the MAT by filing applications individually. By a common judgment and order dated 5th May 2005, all the applications were dismissed. That order is challenged in these petitions.

5. It was the case of the petitioners before the MAT that the computation of vacancies for appointment to the posts of PSI by selection on the basis of the limited departmental examination was erroneous. The same stand is repeated in these petitions. The petitioners contended that though the vacancies were much more (even as per the chart annexed to the affidavit filed in this Court on behalf of the respondent no.1), the respondent no.1 erred in sending requisition to the MPSC to recommend names of only 300

persons. As per the affidavit filed on behalf of the respondent no.1, the total number of sanctioned posts of PSI throughout the State of Maharashtra at the relevant time were 6817. As per Rule 3 of the Recruitment Rules, 50% of the posts were to be filled in by nomination, 25% were to be filled in by promotion and 25% were to be filled in by selection from amongst the police constables on the basis of limited departmental examination. Therefore, total number of posts to be filled in from the police constables by selection through limited departmental examination were 1704. The actual strength of PSIs appointed by limited departmental examination was 951 as on 30th June 2003 and 950 as on 30th December 2003. Therefore, even as per the affidavit of the respondent no.1, 753 posts of PSI were available to be filled in by limited departmental examination in the year 2003. Since there were at least 753 posts of PSI were available to be filled in through limited departmental examination, the decision of the respondent no.1 to send a requisition to MPSC to conduct examination for filling up only 300 posts was erroneous and was required to be set aside. The decision of the respondent no.1 to appoint only 300 persons being based on wrong computation, is required to be set aside. The petitioners have accordingly prayed for issuance of a direction to the MPSC to recommend the

names of candidates from 301 onwards of the merit list for being appointed as PSI to fill up all vacancies in the posts of PSI to be appointed by selection on the basis of limited departmental examination.

6. Learned counsel for the petitioners submitted that though the decision of the respondent no.1 to fill up posts of 300 PSI on the basis of limited departmental examination was administrative in nature, it was subject to judicial review, because the decision was based on wrong assumption that only 300 posts of PSI were available. He submitted that the actual text of the decision taken by the respondent no.1 to fill up only 300 posts of PSI by limited departmental examination and the relevant files on which the decision was noted were not produced by the respondent no.1 before the MAT nor before this Court. He therefore called upon us to pass an order directing production in the civil application made in that behalf by the petitioners. He submitted that if the file is directed to be produced, it would show that the decision taken by the government to fill up only 300 posts of PSI by selection on the basis of limited departmental examination was based on erroneous premises and on erroneous computation of the vacancies. If the vacancies were properly computed, the respondent no.1 would not have taken the decision to fill up only

300 posts of PSI. He therefore submitted that not only the decision was erroneous and illegal but the decision making process itself was flawed as it was based on erroneous assumptions.

7. Counsel for the petitioners referred to and relied upon various decisions of the Supreme Court, namely (i) Nilima Sangla v. State of Haryana, reported in (1986) 4 SCC 268, (ii) Puranjit Singh v. Union Territory of Chandigarh, reported in AIR 1994 SC 2737, (iii) Sandeep Singh v. State of Haryana, reported in (2002) 10 SCC 549, (iv) Food Corporation of India v. Bhanu Lod & Ors., reported in (2005) 3 SCC 618, (v) Mohinder Singh Gill v. Chief Election Commissioner, reported in AIR 1978 SC 851, (vi) M/s Hochtief Gammon v. State of Orissa, reported in (1975) 2 SCC 649, (vii) Reliance Airport Developers Pvt. Ltd. v. Airport Authority of India & Ors., reported in JT 2006 (10) SC 424, (viii) S.N. Mukherjee v. Union of India, reported in (1990) 4 SCC 594, (ix) S.A. Ramanathan v. Union of India & Ors., reported in (2001) 2 SCC 118, (x) Virender S. Hooda & Ors. v. State of Harayana, reported in (1999) 3 SCC 696, (xi) Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai & Ors., reported in (2005) 7 SCC 627.

8. Per contra, Mr.Kumbhakoni, learned Associate Advocate General appearing for the respondent no.1 State of Maharashtra, submitted that the government took a policy decision to fill up 300 posts of PSI out of the 25% quota of the limited departmental examination after examining the proposal received from the Director General of Police and taking into consideration various other factors mentioned in the affidavit filed before the MAT. Accordingly, a requisition for recommending names of 300 police constables was sent to MPSC in the year 2002. The MPSC issued an advertisement inviting applications to fill up only 300 posts of PSI by limited departmental examination from amongst the police constables. Written test was held by the MPSC on 29th June 2003 and results of the written test were declared on 6th March 2004. The first 1200 candidates in the order of merit of the marks obtained in the written examination were called for physical examination of 100 marks. After the physical examination, interviews were conducted from 11th May to 16th June 2004 and results were declared on 22nd July 2004 in the order of merit of aggregate marks. MPSC sent recommendation to the government of 300 candidates as per the requisition of the government. All the 300 candidates recommended by the MPSC for appointment of police sub-inspectors by nomination by limited departmental examination of the

persons working in the police force were sent for training to the Police Training Institute at Nasik and have been appointed as PSI. Mr.Kumbhakoni submitted that it is the prerogative of the government to decide how many vacancies should be filled in. The government had taken the decision to fill in only 300 vacancies by limited departmental examination by taking into consideration all relevant factors. He invited our attention to paragraph 5.5 of the affidavit in reply filed on behalf of the government before the MAT Therein, it was stated that the quota for appointment of PSI was only 752, out of which 406 vacancies were already filled up as directed by the High Court by its order dated 24th April 2002 passed in Writ Petition No.4625 of 2001. There were, thus, vacancies of only 347 posts of PSI to be filled up by limited departmental examination and the government took the decision of filling up 300 vacancies taking into consideration all the relevant factors including intake capacity of the Police Training Academy at Nasik and the need of filling up the vacancies in the cadre of PSI from other streams also, namely by nomination by direct examination by the MPSC and by regular departmental promotions. He submitted that the decision to fill up 300 posts was an administrative decision which did not suffer from any illegality, much less Wednesbury unreasonableness;

therefore, the decision was not open for judicial scrutiny. It was emphatically submitted that the government was not obliged to fill up all vacancies that exist in a cadre, but it may choose to fill up only some of the posts leaving others unfilled, taking into consideration various circumstances including the financial constraints of the State. Even if a candidate is successful and selected and his name is placed in the select list, he has no right for appointment to the post and the State even after preparing the select list is entitled to cancel it and/or not to appoint the person whose name appears in the select list. No mandamus can be issued directing the State to issue an appointment letter even if the name of the candidate appears in the select list and no candidate has right of appointment until the appointment is actually made. In support of his submissions, learned Associate Advocate General relied upon the decisions of the Supreme Court in State of Haryana v. Subhash Chander Marwah, reported in (1974) 3 SCC 220, Jammu & Kashmir Public Service Commission v. Dr. Narinder Mohan, reported in (1994) 2 SCC 630, T.N. Administrative Services Officers' Association v. Union of India, reported in (2000) 5 SCC 728, Jatinder Kumar v. State of Punjab, reported in (1985) 1 SCC 128, Bihar State Electricity Board v. Suresh Prasad, reported in (2004) 2 SCC 685, State of

Haryana v. Naresh Kumar Bali, reported in (1994) 4 SCC 448, and Virender Singh Hooda v. State of Haryana, reported in (2004) 12 SCC 588.

9. Though a number of decisions were cited, many of them are on the same point and some of them do not appear to us to be relevant to the points for consideration before us. We would therefore refer only to those decisions which appear to us to be relevant and omit the repetitive decisions covering the same point.

10. In **Nilima Sangla v. State of Haryana, reported in (1986) 4 SCC 268**, the Supreme Court held that it was the duty of Public Service Commission to prepare select list of all successful candidates and to communicate the same to the government and that the Public Service Commission erred in withholding the names of several successful candidates. After referring to its earlier decision in the case of **State of Haryana v. Subhash Chander Marwah, reported in (1974) 3 SCC 220**, the Supreme Court held that the selection cannot be arbitrarily restricted to a few candidates, notwithstanding the number of vacancies and availability of qualified candidates. There must be conscious application of mind by the government and the High Court (which was to appoint judicial officers) before the

number of persons selected for appointment was restricted. In our view, the decision of the Supreme Court in State of Haryana v. Subhash Chander (supra) is clearly distinguishable as it was based on an interpretation of Rule 8 of the applicable Rules. There is no such rule similar to the Rule 8 in that case in the present case. The advertisement of the MPSC issued in the present case stipulated minimum number of marks to be obtained in the written and physical examinations and minimum number of marks to be obtained in the aggregate being considered by it. It did not mean that all the candidates, who obtained the minimum number of marks, were to be recommended for the appointment. The minimum prescribed marks were only the cut of marks below which the candidate was not eligible for being considered for appointment. If more than 300 candidates secured higher than the minimum prescribed marks, then recommendation was to be restricted to the first 300 candidates. The zone of consideration was four times the number of candidates subject to the condition they had obtained the minimum number of marks in the written and physical examinations and in the aggregate. In **LIC of India v. E. Pravin Kumar, reported in 1990 Lab. I.C. 1422**, the Supreme Court has clearly laid down that when a large number of candidates become eligible for selection to a few posts, it is permissible to have a

zone of consideration which is based on some rational criterion. A demarcation fixed with reference to marks obtained at a public examination and then selecting the more merited amongst them, cannot be said to be based on any irrational basis. In the present case, there were only 300 posts to be filled up as per the government decision. The zone of consideration was restricted to four times the posts to be filled in and accordingly the candidates who stood within that zone of first 1200 candidates in order of merit in the written examination were called for physical test and then to undergo oral interview. This does not mean that all 1200 candidates who were called for physical test stood selected. They were only included in the zone of consideration. but it was a method of fixing a zone of consideration.

11. Counsel appearing on behalf of the petitioners, took exception to the decision of the government to send requisition to MPSC for only 300 candidates when, according to the counsel, the total number of vacancies in the post of PSI to be filled up by limited departmental examination were much more and, in any event, were not less than 1592. Counsel, therefore, submitted that the decision of the government to call for recommendation of only 300 names is required to be quashed as illegal and irrational. Counsel half

heartedly submitted that the number of PSIs in the State of Maharashtra was inadequate and filling up of all the vacancies in the cadre of PSI was necessary for maintenance of law and order which is constitutional obligation of the State. The State must, therefore, appoint sufficient number of PSI and not to keep any vacancies in their cadre. We are not inclined to consider the larger issue of duty of the State to maintain law and order and to appoint sufficient number of police officers for that purpose. There are no sufficient pleadings for considering that issue. The main grievance of the petitioners in these petitions is that they have not been selected and have not been appointed though, according to them, they have passed the limited departmental examination by securing more than the minimum number of marks in the written examination, physical examination and in the aggregate as fixed by the MPSC. The petitioners have not approached this Court in the public interest requiring the State to perform its functions and duties. They are pursuing their private interest of securing appointment to the posts of PSI. In the circumstances, we decline to go into the larger issue of constitutional obligation of the State to maintain law and order and the adequacy or otherwise of the existing cadre of PSI for fulfilling that obligation and restrict our consideration to

whether the petitioners have a right to be appointed. It may also be noted that the advertisement issued by the MPSC on 24th February 2003 clearly stated that the limited departmental examination was to be held for appointment of PSI from amongst the police personnel to the extent of 300 posts. Applications were accordingly invited from the eligible police personnel to appear for the limited departmental examination. The petitioners applied in pursuance of the said advertisement and appeared for the examination. Having found that their names do not appear in the order of merit in the first 300 candidates, they are now making a grievance that advertisement ought to have been for 1592 posts and/or posts more than 300 and the government was not justified in restricting the advertisement for 300 posts. The petitioners took their chance and appeared for the limited departmental examination and were unsuccessful to find place in the first 300 candidates in the order of merit. Having taken part in the selection process, the petitioners cannot take exception to the advertisement and contend that the advertisement should have been for number of posts. Even otherwise, we are of the view that the decision of the government to fill up 300 posts only out of the posts of PSI by limited departmental examination being an administrative decision not suffering from any infirmity cannot be

subject to judicial scrutiny for the reasons indicated below.

12. In **Shankarsan Dash v. Union of India, reported in AIR 1991 SC 1612**, a Constitution Bench of the Supreme Court has held that unless relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, that does not mean that the State has a licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons. If the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates as reflected in the recruitment test and no discrimination can be permitted. In our view, this decision clearly lays down that the State is not bound to fill up all the vacancies though it cannot act arbitrarily in filling up a vacancy if it chooses to fill up the vacancy. When it is alleged that the decision is arbitrary, the burden of proving so is clearly on the person who alleges it. It is true that ordinarily the material on which the decision is based is within the special knowledge of the government who takes the decision and the petitioners may not have an access to the said material, but that would not shift the burden of proving arbitrariness of the decision from

the person who alleges arbitrariness to the State. Before the MAT, the government had filed an affidavit giving detailed reasons why it decided to fill up only 300 posts. In paragraph 2.6 and 5 of the affidavit, Mr.Vasant Krishna Patil, Under Secretary, in the Home Department of State of Maharashtra, after asserting the prerogative of the government to decide how many vacancies be filled in, has stated that after the decision of O.A. No.308 of 2001, the question of filling up of the vacancies of PSI was considered by the government after taking into consideration the intake capacity of the Maharashtra Police Academy at Nasik, where the candidates selected for PSI are required to be sent for mandatory training of one year. A conscious decision was taken of sending requisition to MPSC for 300 posts by taking into consideration limited intake capacity of Maharashtra Police Academy at Nasik and the proposal of Director General of Police for filling up 550 posts of PSI by direct recruits. At this stage, it may be stated that as per Rule 3 of the Police Sub-Inspectors (Recruitment) Rules, 1995, 50% of the posts in the cadre of PSI are to be filled up by nomination on the basis of competitive examination and 25% posts are to be filled up by regular promotion and 25% posts are to be filled up by selection by limited departmental examination. In other words, the ratio of

candidates are to be selected by nomination by competitive examination and the candidates to be selected by limited departmental examination is 2:1. The government took a decision to send requisition to MPSC of 500 posts by nomination (by competitive examination) and 300 posts by limited departmental examination. If the strict rule of 2:1 was to be applied, then the posts of PSI available for selection by limited departmental examination would have been only 275. As against that, the government took a decision to send requisition for 300 posts of PSI by limited departmental examination. The decision, if at all, was thus more favourable to the petitioners and the candidates appearing for limited departmental examination, and can in no way be said to be prejudicially affecting their interests and cannot, in any way, be said to be unreasonable much less suffering from any Wednesbury unreasonableness.

13. Counsel for the petitioners referred to the decision of the Supreme Court in **Reliance Airport Developers Pvt. Ltd. v. Airport Authority of India, reported in JT 2006 (10) SC 424** to contend that the decision of the government to send requisition to MPSC for recommending the names of 300 candidates to be appointed as PSI by limited departmental examination

suffered from Wednesbury unreasonableness inasmuch as though there were 1592 vacancies, requisition was sent only for 300 posts. As stated earlier, whether there were 1592 vacancies or not is a disputed question of fact. MAT has not recorded a finding that there were 1592 vacancies in the posts of PSI to be appointed by limited departmental examination. In the absence of such clear finding, we are unable to hold that there were 1592 vacancies. Assuming, however, that the vacancies in the posts of PSI to be appointed by limited departmental examination were more than 300, for which the requisition was sent by the government, the decision to send requisition for 300 posts cannot be impugned successfully. The contours of judicial review of an administrative decision are limited. In **Tata Cellular v. Union of India, reported in (1994) 6 SCC 651**, which has been followed in Reliance Airport Developers Pvt. Ltd. (supra), the Supreme Court has held that in considering the validity of an administrative decision, the duty of the court is to confine itself to the question of legality. Its concern should be whether a decision-making authority (1) exceeded its powers, (2) committed an error of law, (3) committed a breach of the rules of natural justice, (4) reached a decision which no reasonable tribunal would have reached, or (5) abused its powers. In our view, none of these grounds have

been made out. Except for urging that decision to fill up only 300 vacancies when there were much more was arbitrary, no other ground impugnity the validity of the decision was seriously urged before us. As stated earlier, the affidavit in reply filed before the MAT clearly gives the rational behind the decision and we find no irrationality, much less illegality, in the decision.

14. Mr.Godbole, learned counsel for the petitioners, however, urged that the reasons given in the affidavit in support of the decision of the government for sending requisition of only 300 posts cannot be looked into and the reasons must be found in the order itself. In support of this contention, counsel referred to and relied upon a decision of the Constitution Bench of the Supreme Court in **Mohinder Singh Gill v. The Chief Election Commissioner, reported in AIR 1978 SC 851**. In para 8 of the said decision, the Supreme Court has observed:-

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of

> affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to the court on account of a challenge, get validated by additional grounds later brought out."

These observations, on which strong reliance was placed by Mr.Godbole, must be read in the context in which they are made and the facts and points requiring adjudication. In that case, the Chief Election Commissioner had passed an order cancelling the poll already held and ordering repoll and extending time for completion of the election by amending Election Commission's earlier notification. While considering the validity of the order of the Chief Election Commissioner cancelling the poll and ordering repoll, the Court held that the validity of the order must be judged from the reasons mentioned in the order and not from the subsequent affidavit justifying the order. It may be noted that elections were held in accordance with the provisions of the Representation of People Act and the order cancelling the poll and ordering repoll was passed purportedly in exercise of statutory powers under the Representation of People Act. The order was a speaking order passed in exercise of statutory powers and the order was required to mention reasons for

cancellation of the poll. It was in that context that the Supreme Court held that the reasons for the order must be found in the order itself and not in the affidavit filed in support of the order in the court before which the order was under challenge. The decision to fill up 300 posts of PSI is not a statutory order passed in exercise of any statutory power requiring the State to record any reasons. There is no law which requires the State to record any reasons when it decides to fill up only a few of the vacant posts nor the rules of natural justice require the State to record any reasons for the decision. It was thus not obligatory on the government to record any reasons for its decision to fill up 300 posts of PSI. Hence, we are unable to agree that the MAT could not and we also cannot take into consideration the reasons given by the State in the affidavit of Mr.Vasant Krishna Patil, Under Secretary, Home Department, Government of Maharashtra for filling up only 300 posts of PSI by limited departmental examination.

15. Strong reliance was placed by the counsel appearing for different petitioners on the two decisions of the Supreme Court, which we would presently notice. In **Virender S. Hooda v. State of Haryana, reported in (1999) 3 SCC 696**, the facts were that the Haryana Public

Service Commission (for short "the Commission") had advertised for recruitment to Haryana Civil Service Executive Branch and other allied services. The Commission held written examination for the 1991 batch and interviewed the candidates who had passed written examination in May 1992 and final results were published on 19th June 1992. Appellants 2 and 3 before the Supreme Court were offered appointments as Excise & Taxation Officer and Tahsildar respectively. They joined their duties. Appellant 1 thereafter filed a writ petition in the High Court which was dismissed. Matter was carried to the Supreme Court wherein the appellants 2 and 3 got themselves impleaded. By an order dated 30th October 1995, the Supreme Court disposed of the matter with liberty to the appellants to file proper writ petitions for getting appointments on the basis of earlier selection bearing in mind the circulars dated 22nd March 1957 and 22nd June 1972. Contention before the High Court and on an appeal before the Supreme Court was that the government had issued instructions prescribing procedure to be adopted by the Commission which stated that apart from those selected against the vacancies, all notified additional vacancies which arise within six months from the recommendation of the names could be filled up from amongst the names recommended by the Commission. The High Court dismissed

the writ petition on the ground of delay and also holding that the administrative instructions cannot be read as making obligatory for the appointing authority to appoint candidates in excess of the advertised posts. Allowing the appeal, the Supreme Court held that the view of the High Court that administrative instructions cannot be enforced and the vacancies which became available after the initiation of the process of recruitment cannot be looked into was too narrow. When the policy had been declared by the State as to the manner of filling up of the posts by issuing instructions from time to time, so long as the instructions were not contrary to the rules the respondents ought to follow the same. Accordingly, the Supreme Court directed the respondents to consider the case of the appellants for appointment to the posts of Haryana Public Civil Service (Executive Branch) in view of the vacancies which had arisen after the results were declared. In **Sandeep Singh v. State of Haryana, reported in (2002) 10 SCC 549**, the Supreme Court followed its earlier decision in Virender S. Hooda (supra) and held that the vacancies available in any particular service till the date of the interview should be filled up from the very same examination unless there was any statutory embargo for the same. Relying on the aforementioned two decisions, counsel for the

petitioners submitted that apart from the vacancies which existed on 14th February 2003 when the advertisement for filling up of the 300 posts of PSI by limited departmental examination was issued, some more vacancies had arisen till the appointment orders to the 300 candidates were issued and they should also have been filled in by the government. The MPSC declared the select list of 300 candidates only in July 2004 though initial advertisement was issued in February 2003 and, therefore, the vacancies which arose till July 2004 also ought to have been considered by the government and orders should have been issued to fill up those vacancies also. It may be noted that since beginning the contention of the petitioners has been that the number of posts of PSI available for being filled up by limited department examination were 1592. Though that number was disputed, it is undisputed that the number of posts available were far more than 300. Though the vacancies were much more, even on the date of advertisement, the government had taken a decision to fill up only 300 posts. In such circumstances, the question of filling up additional vacancies which arose after the advertisement dated 24th February 2003 does not arise. In the case of Virender S. Hooda (supra), there was a policy of the state government declared in terms of the rules and instructions issued to the Public

Service Commission that the further vacancies available within a period of 6 months from the commencement of the previous selection should also be filled up from the candidates who had passed the examination of the Commission. There is no such policy of the Government of Maharashtra. On the other hand, clause 10 of the government decision dated 8th February 1996 (Exhibit-C to Writ Petition No.8624 of 2006) which applies to present case clearly states that there shall be no waiting list. Thus, the applicable decision in the present case does not contemplate preparation of any waiting list of the candidates for being considered to fill up the vacancies which may arise in future. In fact, even out of the existing vacancies, which were more than 300 in any case, the government had taken a decision to fill up only 300 posts of PSI by limited departmental examination. In such circumstances, it cannot be stated that the vacancies which had arisen after the advertisement dated 22nd February 2003 should also have been taken into consideration while preparing the select list of candidates. The MPSC was not required nor entitled to send list of more than 300 candidates. The decision of the Supreme Court in Sandeep Singh v. State of Haryana (supra) follows its earlier decision in Virender S. Hooda (supra). In our view, the facts in the present case are different and

the two cases cited above are not applicable to the present case. Even otherwise, the Supreme Court in its decision in the case of **Virender S. Hooda v. State of Haryana, reported in (2004) 12 SCC 588** (Third Hooda Case) has noted that the decision in the case of Sandeep Singh was based on circulars of the State Government dated 22nd March 1957 and 26th June 1972 which circulars have since been repealed. In para 43 of its decision in Third Hooda case, the Supreme Court observed that during the long gap of years between one advertisement and another advertisement, a number of other persons who had attained eligibility would be deprived of an opportunity to compete for the posts advertised subsequently if the future vacancies were to be filled up on the basis of results of the past examination. Besides, there being absence of provision for waiting list in the statutory rules and repeal of earlier circulars, larger public interest demanded grant of opportunity to all eligible candidates. In the present case, if we were to direct that the future vacancies which have arisen after 24th February 2003 when the advertisement was issued till the date when the select list was published by the MPSC must be taken into consideration for filling the vacancies in the posts of PSI, that would result in denial of opportunity to the candidates who have become eligible for appearing for the examination during the intervening

period. As held by the Supreme Court in the Third Hooda Case (supra), larger public interest requires that the opportunity must be given to all other candidates who have become eligible to compete for the selection. It would not therefore be appropriate to issue any direction that posts which have become vacant till the date of appointment should also be filled up from the results of the limited departmental examination held in the year 2003-04.

16. More than three decades ago, in **State of Haryana v. Subhash Chander Marwah, reported in (1974) 3 SCC 220**, the Supreme Court held that mere entry in the select list does not give a candidate a right to be appointed. It may happen that the government for financial or other administrative reason may not fill up any vacancy. In such a case, even the first in the select list will have no right to be appointed. The select list is prepared merely to help the government in making appointments. The law laid down in the said case has stood the test of time and has been reiterated by the Apex Court in several decisions. In **Jatinder v. State of Punjab, reported in (1985) 1 SCC 122**, a Bench of three Judges of the Supreme Court following its earlier decision in State of Haryana v. Subhash Chander Marwah (supra) held that the selection of a person by

the Commission is only a recommendation of the Commission and the final authority for appointment is the government. The person whose name is recommended cannot claim a right of appointment on the basis that the government must accept the recommendation of the Commission. If, however, the vacancy is to be filled up, the appointment has to be made strictly adhering to the order of merit recommended by the Public Service Commission. It is open to the government to decide how many appointments will be made. In T.N. Administrative Service Officers' Association v. Union of India, reported in (2000) 5 SCC 728, the Supreme Court observed that it is a well settled principle in service jurisprudence that even when there is a vacancy, the State is not bound to fill up such vacancy nor is there any corresponding right vested in an eligible employee to demand that the post be filled up. The decision to fill up a vacancy or not vests with the employer who for good reasons, be it administrative, economical or policy, can decide not to fill up the post(s). It is not necessary to burden the judgment with few other decisions cited which have taken the similar view. Suffice it to say that a person, though he has passed a competitive examination and though his name appears in the select list, has no right of appointment until the employer, be it State Government, takes a decision to

appoint and makes an appointment. Of course, this does not mean that if any appointment is to be made, the government can overlook the comparative merit and appoint someone who is not in the select list or appoint someone who is below the person in the select list ignoring the person higher in the order of merit. In the present case, the government invited recommendation from the MPSC for only 300 candidates. Assuming that there were vacancy of more than 300 posts of PSI, the government was competent to invite list of only 300 candidates which it wished to fill. It only appointed 300 PSI as per the list and no more. The persons who do not find place in the list of merit of first 300 candidates have no right of appointment to the post of PSI.

17. Before we part, we would advert to the submissions by the learned counsel for the petitioners that the Recruitment Rules and the Circulars issued by the State Government in pursuance thereof contemplate holding of limited departmental examination every year and three opportunities to the persons working in the police force for appearing for limited departmental examination. However, limited departmental examinations were not held regularly every year, with the result the petitioners could get only one opportunity for appearing

for limited departmental examination and by the time the fresh examinations would be held, they would be age barred for appearing for the said examination. The petitioners are thus deprived of the opportunity of three attempts of selection through limited departmental examination contrary to the Recruitment Rules and the policy decision of the government. Mr.Kumbhakoni, learned Associate Advocate General, does not dispute this factual aspect. He however submitted that in order to give the petitioners and other similarly situated candidates three opportunities of selection through limited departmental examination, age limit would be relaxed and they would be permitted to appear for the next two examinations. The State would make appropriate amendments in the Recruitment Rules and/or policy decisions in that regard. The statement made by the State through the Associate Advocate General is recorded and accepted. In view of this, no directions are necessary in regard to the allegation of denial of opportunity to the petitioners to have at least three opportunities for selection to the posts of PSI through limited departmental examination.

18. we also notice that during the period between the years 1998 and 2004 only three examinations were held for selection to the posts of PSI through limited

departmental examination. As per the chart submitted to us by the counsel, recommendations were received from the MPSC for appointment to the posts of PSI by limited departmental examination on 22nd September 1999, 16th May 2000, 30th August 2000, 3rd February 2004 and 19th April 2004. Learned Associate Advocate General submitted us that the State would hereafter send the necessary requisition to the MPSC every year. Mr.Pradhan for the MPSC also submitted that if such requisitions are sent yearly, the MPSC would hold the examination annually. Both of them suggested that limited departmental examination for promotion to the posts of PSI would be an yearly feature. This would obviate future disputes. They also gave us a time table for conducting the annual examination. According to the said time table, the Government would take a decision on the number of vacancies to be filled in in the year and forward the requisition to the MPSC before 31st December of the previous year. The MPSC thereafter would issue the advertisement on or before 10th January every year and invite applications upto 25th January or the next working day if it is a holiday. The MPSC would conduct the written examination before 30th March and declare the results of the same before 30th April and conduct the physical test on or before 31st May and conduct the oral examination/interviews by 20th June every year.

The MPSC would then send the final list of recommended candidates to the government before 15th August and the government would place the select list on the website on 31st August. The selected candidates would then be sent for training by 30th September. Learned Associate Advocate General and the counsel for the MPSC submitted that these dates would be adhered to as far as possible. The statement made by the counsel is recorded and accepted. In view of this, no further directions are necessary in that regard.

19. For the reasons stated above, there is no merit in the writ petitions which are hereby dismissed. Rule is discharged. In the facts and circumstances of the case, there shall be no order as to costs.

(D.G. KARNIK, J.) (S.B. MHASE, J.)